No. 89-431

In the Supreme Court of the United States

OCTOBER TERM, 1989

YELLOW FREIGHT SYSTEM, INC.,
Petitioner,

vs.

COLLEEN DONNELLY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF PETITIONER

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50 pp

QUESTION PRESENTED

Whether federal courts have exclusive jurisdiction over claims arising under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

LIST OF PARTIES AND CORPORATIONS

1. Yellow Freight System, Inc. of Delaware. Yellow Freight System, Inc. is a wholly owned subsidiary of Yellow Freight System, Inc. of Delaware.

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The opinion of the United States Court of Appeals for the Seventh Circuit dated April 28, 1989 is reported as 874 F.2d 402. (Appendix to Petition for Writ of Certiorari, hereinafter "A", at A-1 to A-19). In an unpublished order dated July 17, 1989, the United States Court of Appeals for the Seventh Circuit denied Yellow Freight's Petition for Rehearing with Suggestion for Rehearing En Banc. (A-20). The opinion of the District Court of the Northern Distri of Illinois entered on March 17, 1988 adopting the Mag trate's Report is published at 682 F. Supp. 374. (A-24). The Report and Recommendation of the United States Magistrate entered December 10, 1987, is not reported. (A-26 to A-34). The opinion of the District Court entered November 22, 1985 on the issue of jurisdiction in Title VII actions is not reported. The order of the Circuit Court of Cook County, Illinois, dismissing plaintiff's Complaint with prejudice and continuing her contested motion for leave to file amended Complaint, entered August 9, 1985 is not reported. (A-40).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on April 28, 1989 (A-1) and the Petition for Rehearing was denied on July 17, 1989. (A-20). The petition for Writ of Certiorari was filed on September 11, 1989, and this Court granted certiorari, limited to Question 1 presented in the petition, on November 6, 1989. This Court has jurisdiction to review the issues presented herein on Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 706(f) of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. § 2000e-5(f) and Section 706(j) of Title VII, 42 U.S.C. § 2000e-5(j) are set forth in the Petition for Certiorari.

STATEMENT OF THE CASE

This case was initially instituted in the Circuit Court of Cook County, Illinois on May 22, 1985. Asserting that Yellow Freight had wrongfully refused to hire her for a job as a dock worker, Donnelly brought a two-count Complaint alleging sex discrimination in violation only of the Illinois Human Rights Act (Ill. Rev. Stat., Chapter 68, § 1-101 *et seq.* (1983)). Because Donnelly had not attempted to exhaust her administrative remedies, Yellow Freight filed a motion to dismiss the Complaint for lack of jurisdiction. Donnelly then sought leave to file an amended Complaint.

On August 9, 1985, the Circuit Court entered an agreed order dismissing the Complaint with prejudice and continuing Donnelly's contested motion for leave to file an amended Complaint (A-40). On August 14, 1985, Yellow Freight removed the case to the United States District Court pursuant to 28 U.S.C. § 1441(b) and (c).

On September 13, 1985, the District Court granted Donnelly leave to file an amended Complaint. On September 20, 1985, Donnelly, for the first time, filed a Complaint alleging violations of Title VII arising out of the same facts which served as a basis for her claims under the Illinois Human Rights Act.

Yellow Freight filed a motion to dismiss the amended Complaint for lack of jurisdiction on the grounds that Donnelly's Title VII claims were untimely (Joint Appendix, hereinafter "J.A." at 17-21). In support of its motion,

Yellow Freight argued that any filing of a Title VII claim in the Illinois Circuit Court, whether before or after the 90 day limit, was ineffective because the federal courts have exclusive jurisdiction over Title VII claims.

Yellow Freight's motion to dismiss the Amended Complaint was denied by the District Court. (A-35 to A-39). Applying this Court's test in *Gulf Offshore Co. v. Mobil Oil*, 453 U.S. 473 (1981), the district court found that Title VII did not contain any explicit directive from Congress vesting the federal courts with exclusive jurisdiction over Title VII claims. The district court also found, without citation to the legislative history, that there was no clear indication from the legislative history that Congress intended to confer on the federal courts exclusive jurisdiction over Title VII actions. The court also concluded that there was no disabling incompatibility between the exercise of concurrent state court jurisdiction over Title VII actions and the federal interests because Title VII was not intended to be an exclusive remedy for employment discrimination.

Inasmuch as Yellow Freight had hired Donnelly before she filed suit, a trial was held before a magistrate on the issue of backpay liability. Donnelly was awarded backpay for the time from when she should have been hired until her actual date of hire. (A-26 to A-34). The district court adopted the magistrate's report. (A-23 to A-25).

On appeal to the United States Court of Appeals for the Seventh Circuit, Yellow Freight argued that any filing in the Illinois state court could not toll the statute of limitations because the federal courts have exclusive jurisdiction over Title VII claims.

The Seventh Circuit rejected Yellow Freight's argument concluding that state courts have concurrent jurisdiction over Title VII claims. (A-11). Applying this court's decision in *Gulf Offshore*, the Seventh Circuit found

that Congress did not explicitly confer exclusive jurisdiction over Title VII claims on the federal courts. The court then concluded that the language and legislative history of Title VII did not demonstrate that Congress implicitly conferred exclusive jurisdiction over Title VII claims on the federal courts. The court reasoned that the fact that the legislative history consistently referred to the federal courts as the forum for Title VII claims did not unmistakably establish that Congress intended to deprive states of jurisdiction over Title VII claims. Rather, the court found that such references merely established that Congress intended to grant federal courts jurisdiction over Title VII claims.

The Seventh Circuit also placed significance on the fact that Title VII was not intended to be the exclusive remedy for employment discrimination. The Seventh Circuit found that there was no incompatibility between concurrent state court jurisdiction over Title VII claims and the federal interests. The court stated that there was no reason to believe that concurrent jurisdiction would lead to an arbitrary development of Title VII law because state courts were bound to follow the large body of Title VII case law under the supremacy clause. The Seventh Circuit concluded that state court judges were sufficiently competent to deal with Title VII claims because most states had enacted employment discrimination laws which are regularly litigated in state courts. The Seventh Circuit also found that there was no reason to believe that state courts would be hostile to Title VII claims because state courts have concurrent jurisdiction over § 1983 claims. The court reasoned that there was no reason to believe that the courts would be hostile to Title VII claims, but not hostile to § 1983 claims since similar policy considerations underlie both statutes.

The Seventh Circuit also found that the fact that a state legislature may not provide a forum for Title VII claims did not preclude the exercise of concurrent jurisdiction because Congress can constitutionally require a state court to hear a federal cause of action.

In reaching its decision, the Seventh Circuit also reversed its earlier decision in *Brown v. Reliable Sheet Metal Works, Inc.*, 852 F.2d 932 (7th Cir. 1988), and held that a state court filing tolls the 90 day statute of limitations even where a plaintiff does not exhaust her state administrative remedies.

Yellow Freight filed a petition for rehearing with suggestion for rehearing en banc with the Seventh Circuit. The court denied the petition on July 17, 1989. (A-20 to A-21).

SUMMARY OF ARGUMENT

Although there is a presumption that state courts share concurrent jurisdiction over federal statutory claims, the presumption can be overcome by an explicit statutory directive, by an unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981). Factors generally recommending exclusive jurisdiction over an area of federal law include the desirability of uniform interpretation, the expertise of federal judges in federal law and the assumed greater hospitality of federal courts to peculiarly federal claims. *Id.* at 483-84.

In enacting Title VII of the Civil Rights Act of 1964, 78 Stat. 253 (1964), Congress did not explicitly state its intent that jurisdiction over Title VII actions rest exclusively in the federal courts. The legislative history, however, contains unmistakable evidence of this intent. The major congressional debate focused on whether en-

forcement would proceed through an administrative body with cease-and-desist authority or through suits in the federal district courts. Although the House Committee favored use of the cease-and-desist approach, a substantial number of committee members "prefer that the ultimate determination of discrimination rest with the Federal judiciary." H.R. Rep. 914, 88th Cong., 1st Sess. (separate views of Rep. McCullouch) reprinted in United States Equal Employment Opportunity Commission, Legislative History of Titles VII and XI of the Civil Rights Act of 1964 (herein cited as "1964 Leg. Hist.") at 2150. The McCullouch approach was eventually adopted.

The Senate bill was the subject of a series of compromises hammered out on the Senate floor. Proponents first eliminated the proposal for the EEOC to exercise cease-and-desist power in favor of its right to bring suit "in a federal district court." If the Commission decided not to sue, the party allegedly discriminated against would have a right to "bring his own suit in Federal court." In either case the suit "would proceed in the usual manner for litigation in the Federal courts." Interpretive Memorandum of Senators Clark and Case, 1964 Leg. Hist. at 3044.

The final compromise eliminated the right of the EEOC to bring suit on behalf of an aggrieved individual. If the Commission was not able to obtain voluntary compliance, it was to notify the person aggrieved, who then had 30 days to "bring his own suit in Federal court for enforcement of his rights." *Id.* at 3004 (Remarks of Sen. Humphrey).

The 1972 amendments to Title VII continued the policy of exclusive federal jurisdiction over Title VII claims. In the House of Representatives, Representative Erlenborn offered an amendment substituting court enforcement for the cease-and-desist approach. In explaining the proposal, he made it clear that "my bill would require any case to be tried there [the Federal district courts] . . . ." Senate Committee on Labor and Public Welfare, Subcommittee on Labor, Legislative History of the Equal Employment Opportunity Act of 1972 (herein cited as "1972 Leg. Hist.") at 219. The House adopted the Erlenborn substitute.

The Senate also rejected the cease-and-desist approach in favor of a court enforcement mechanism proposed by Senator Dominick. Senator Dominick expressed that his amendment would "vest adjudicatory power where it belongs—in impartial judges shielded from the political winds by life tenure." *Id.* at 549. Opponents of the Dominick amendment understood that it was "[i]n the district courts, where under the Dominick amendment suits would have to be filed . . . ." *Id.* at 905 (remarks of Sen. Javits). The legislative history of both the House and Senate bills reveals that Congress understood federal courts would have exclusive jurisdiction over Title VII.

As finally adopted by Congress the 1972 amendments to § 706 contain several provisions which are clearly incompatible with concurrent state court jurisdiction over Title VII claims. Thus, § 706(j) provides that any Title VII action "shall be subject to appeal as provided in Sections 1291 and 1292, Title 28." 42 U.S.C. § 2000e-5(j). These sections govern appeals to the federal courts of appeals. Because Congress could not have intended that actions brought in state courts be appealed to the federal courts of appeals, § 706(j) unmistakably implies that Congress intended to vest exclusive jurisdiction in the federal courts.

Title VII also contains several procedural devices that Congress considered important adjuncts to ensure that rights under Title VII could be effectively enforced. Section 706(f)(4) requires that an individual judge be desig-

nated immediately to hear and determine Title VII claims. Section 706(f)(5) requires that the designated judge assign the case for hearing at the earliest possible date and cause it to be in every way expedited. If the case is not scheduled for trial within 120 days after issue has been joined, the judge may appoint a master "pursuant to Rule 53 of the Federal Rules of Civil Procedure." Section 706(f)(2) provides that injunctive relief "shall be issued in accordance with Rule 65 of the Federal Rules of Civil Procedure." The Federal Rules of Civil Procedure are not applicable in state court proceedings. Similarly, the other procedural devices in § 706 may have no analog in the state courts.

Taken together these provisions exhibit a delicately balanced remedial scheme. State court adjudication of Title VII claims would disrupt this scheme and thus be incompatible with the federal interests.

ARGUMENT

I. Federal Courts Have Exclusive Jurisdiction Over Claims Arising Under Title VII Of The Civil Rights Act of 1964, as Amended, 42 U.S.C. § 2000e *Et Seq.*

A. The presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.

Even before the Constitution was adopted the framers understood that Congress would have the option of vesting jurisdiction over federal statutory claims exclusively in the federal courts or conferring jurisdiction concurrently on the state and federal courts. *See* The Federalist No. 82 (A. Hamilton). Hamilton's views were first addressed in *Claflin v. Houseman*, 93 U.S. 130 (1876), where this Court

established a three part test to determine if jurisdiction under a particular federal statute is exclusively federal. The first inquiry is whether Congress expressly conferred exclusive jurisdiction on the federal courts. If not, the Court must decide if Congress conferred exclusive jurisdiction by implication, or if concurrent jurisdiction would be incompatible with the federal interests served by the underlying statute. *Id.* at 136-137.

Over the years the *Claflin* test was applied in a series of cases. In *Second Employers' Liability Cases*, 223 U.S. 1 (1912) and *Missouri ex rel. St. Louis, Brownsville & Mexico Ry. v. Taylor*, 266 U.S. 200 (1924), the Court found concurrent state-court jurisdiction over claims which involved federal statutes that were based essentially on common law negligence principles that were familiar to the state courts. In neither case was there evidence of any congressional intent to make federal jurisdiction exclusive. Nor was any incompatibility identified between state-court jurisdiction and the purposes of the federal statutes.

More recently this Court invoked the *Claflin* test in *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), a case alleging breach of a collective bargaining agreement, arising under § 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a). The Court concluded that state courts had traditionally been open to breach of contract actions such as those contemplated by section 301(a), but that Congress had intended to expand the forums in which claims for breach of collective bargaining agreements could be brought by making those claims cognizable in the federal courts. *Id.* at 508-09. Moreover, the Court found explicit evidence that Congress expressly intended not to encroach on the jurisdiction of the state courts. 368 U.S. at 512.

This Court's most recent application of the *Claflin* principle was *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981). Reaffirming the basic approach to the question of exclusive jurisdiction set forth in *Claflin* and *Dowd*, the Court described the analytical framework as follows:

> In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction. Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.

Id. at 478 (citations omitted).

Gulf Offshore arose out of a personal injury claim filed by a worker on an oil-drilling platform off the coast of Louisiana who sustained injuries while being evacuated from the area during a storm. Under the Outer Continental Shelf Lands Acts, 43 U.S.C. § 1331 *et seq.* ("OCSLA"), Congress declared the outer continental shelf to be "an area of exclusive federal jurisdiction." Thus, all law applicable to the outer continental shelf was federal law. However, OCSLA borrowed the "applicable and not inconsistent" laws of the adjacent states as surrogate federal law to fill the substantial "gaps" in the Act's coverage. 453 U.S. at 480 (quoting 43 U.S.C. § 1333(a) (1) and (2)).

Under OCSLA, the personal injury law of Louisiana was made applicable to the claim. At issue was whether state courts had jurisdiction over OCSLA actions that were governed by such "borrowed" state law. The Court expressly declined to decide if federal courts would have

exclusive jurisdiction over suits involving other provisions of OCSLA. 453 U.S. at 480 n.7.

In examining the legislative history, the Court found only one comment which made reference to OCSLA conferring exclusive jurisdiction to the federal courts. Senator Long, an opponent of the bill, expressed a fear that OCSLA would place exclusive jurisdiction over all civil suits in federal district courts. 453 U.S. at 483 n.10. The Court refused to rely on this single statement as an implication of exclusive federal jurisdiction because "[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation." 453 U.S. at 483, *quoting Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, 394 (1951).

Turning to the incompatibility standard, the Court first held that exclusive political jurisdiction did not necessarily imply exclusive judicial jurisdiction. 453 U.S. at 480-82. After finding that the operation of OCSLA would not be frustrated by state-court jurisdiction over personal injury actions, the Court reasoned as follows:

> The factors generally recommending exclusive federal-court jurisdiction over an area of federal law include the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims.

453 U.S. at 483-84. (footnotes omitted). The Court held that these three factors did not support exclusive federal jurisdiction over claims whose governing rules were borrowed from state law. First, there was no need for any uniform interpretation of laws that vary from one state to another. Second, state judges have greater expertise in applying their own laws. Third, state judges cannot be presumed unsympathetic to a claim governed by state rules for decision merely because it is labeled federal.

After examining all of these factors the Court concluded that "nothing in the language, structure, legislative history, or underlying policies of OCSLA suggests that Congress intended federal courts to exercise exclusive jurisdiction over personal injury actions arising under OCSLA." 453 U.S. at 484.

While *Dowd* and *Gulf Offshore* reaffirmed the validity of the *Claflin* test and explained its contours, there have been other cases in which this Court has, without reference to *Claflin*, held federal-court jurisdiction to be exclusive. *See General Investment Co. v. Lake Shore & Michigan Southern Ry. Co.*, 260 U.S. 261, 287-288 (1922) (claims under the Sherman Anti-trust Act and the Clayton Act may not be brought in state court); *Freeman v. Bee Machine Co.*, 319 U.S. 448, 451 n.6 (1943) (same); *Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 380-381 (1985) (same); *Garner v. Teamsters Local No. 776*, 346 U.S. 485, 491 (1953) (State courts may not enjoin conduct prohibited by the National Labor Relations Act).

Despite the Court's omission of any reference to *Claflin*, these cases all appear to be consistent with the principles articulated there. *Claflin*, *Dowd*, and *Gulf Offshore* establish that in the absence of an express congressional directive of exclusive federal-court jurisdiction, the Court must examine such factors as the language, structure, legislative history and underlying policies of the particular statute to determine whether Congress intended to confer exclusive jurisdiction in the federal courts. If such an intent is revealed by unmistakable implication from the legislative history or by a clear incompatibility between state-court jurisdiction and federal interests, then federal jurisdiction over the claim is exclusive.

As applied to Title VII of the Civil Rights Act, such an examination reveals an unmistakable implication arising

from the legislative history that Congress intended jurisdiction over Title VII actions to be exclusively federal. Moreover, the clear incompatibility between the procedures set forth in Title VII and state-court jurisdiction reveals that the federal interest would be compromised by a finding of concurrent jurisdiction. Each of these factors compels the conclusion that Title VII actions are within the exclusive jurisdiction of the federal courts.

B. Title VII's legislative history shows unmistakably that Congress intended that claims be brought exclusively in the federal courts.

The current language authorizing suits under Title VII is contained in § 706 of the Act, 42 U.S.C. § 2000e-5. This language was the subject of extensive congressional deliberation and compromise both when the Act was originally adopted in 1964, and when it was amended in 1972. Throughout that time, both congressional proponents as well as opponents of the legislation evidenced a clear understanding that the statute called for claims to be adjudicated solely in the federal courts.

1. As originally adopted the Civil Rights Act of 1964 unmistakably demonstrated that Congress intended that claims be brought solely in the federal courts.

Congress considered four different enforcement mechanisms for the proposed Civil Rights Act of 1964. The first two of these enforcement mechanisms would have created an administrative body similar to the National Labor Relations Board whose orders would be enforced in the federal courts of appeals. The latter two proposals called for enforcement actions in the federal district courts.

The first bill to receive significant consideration was H.R. 10144. Many of the provisions of this bill eventually

found their way into the Civil Rights Act of 1964. H.R. 10144 made it unlawful to discriminate on the basis of race, religion, color, national origin, ancestry or age. The law was to be administered by a five-member Equal Opportunity Commission with authority to use three approaches to gain compliance:

(1) Educational efforts;

(2) Investigation, conciliation and mediation; and

(3) Recourse to civil action in the Federal Courts in the event that the first two approaches fail.

H.R. Rep. 1370, 87th Cong., 2d Sess., 1964 Leg. Hist. at 2160. In the event that the Commission failed or declined to bring an enforcement action, the aggrieved individual was authorized to bring the action if one member of the Commission gave permission for him to do so. *Id.* at 2167.

The most important of the House bills was the Kennedy Administration's omnibus civil rights bill, H.R. 7152, which substituted a de novo court proceeding initiated by the Commission for the administrative type of cease-and-desist authority. As explained by Senator Clark, the Floor Manager of Title VII, it authorized the Equal Employment Opportunity Commission to initiate "an action in the U.S. district court to enjoin the unlawful conduct." If the Commission voted not to proceed, the bill provided that "the charging party may bring a private action in the U.S. district court" with the consent of one member of the Commission. *Id.* at 3070.

In the Senate, the Labor Committee approved Senator Humphrey's bill, S. 1937. Under it, enforcement of the statute was to be handled by an Administrator in the Department of Labor who was authorized to prosecute complaints before an independent Equal Employment Opportunity Board which was authorized to issue cease-and-desist orders which were enforceable in the federal courts of appeals.

At the same time that it was considering S. 1937, the Senate also had H.R. 7152 before it. H.R. 7152 was debated for 83 days and was amended 87 times on the Senate floor. One of the main concerns of the debate was the bill's enforcement mechanism. During this extended debate, a compromise substitute provision was negotiated which was eventually to become § 706 of the Act. As presented to the Senate on June 4, 1964, by Senator Humphrey, it stripped the EEOC of authority to bring enforcement actions, and authorized individuals to bring suit without approval from any of the commissioners. As Senator Humphrey explained:

> The Amendments of our substitute leave the investigation and conciliation functions of the Commission substantially intact. However, if the Commission has not been able to achieve voluntary compliance within 30 days . . . The Commission must so notify the person aggrieved, who then may within 30 days *bring his own suits in federal court* for enforcement of his rights.

Id. at 3003-3004 (emphasis added). The so-called Dirksen-Mansfield substitute amendment was adopted by the Senate on June 17, and the Civil Rights Act was adopted by the House and signed by President Johnson on July 2, 1964.

Of the four separate enforcement schemes considered by the 88th Congress, two would have created an enforcement body similar to the National Labor Relations Board. Had either of these bills been adopted, there would be no question but that state courts would lack adjudicatory authority over Title VII claims.[1]

1. Congress is presumed to know of a judicial interpretation of a prior law when it enacts a new statute with similar language. *See* Lorillard v. Pons, 434 U.S. 575, 580-81 (1978). At the time Congress was considering the cease-and-desist models in S. 1937 and H.R. 405 for

(Footnote Continued)

The other two enforcement schemes called for vindication of Title VII rights through court action, either by the Commission or by the aggrieved individual. If either of these alternatives were thought to contemplate actions in state courts, one would expect some mention of this in the legislative debate. However, there is not a single reference in the legislative history to the possibility that the new federal rights would be enforced in the state courts.

Both the supporters and opponents of the court enforcement mechanism understood that enforcement was to be in the federal courts.[2] Representative McCullouch a leading proponent of the court enforcement mechanism summed up the common understanding:

> As the Title was originally worded, the Commission would have had authority to not only conduct investigations, but also institute hearing procedures and issue orders of a cease-and-desist nature. A substantial number of committee members, however, *preferred that the ultimate determination of discrimination rest with the Federal judiciary.* Through this requirement, we believe the settlement of complaints will occur more rapidly and with greater frequency.

H.R. Rep. 914, 88th Cong. 1st Sess., reproduced in 1964 Leg. Hist. at 2150 (Separate views of Rep. McCullouch) (emphasis added).

Footnote Continued—
inclusion in the Civil Rights Act of 1964, the Court had held that a similar enforcement model enacted in the National Labor Relations Act ousted state courts of adjudicatory authority. Garner v. Teamsters Local 776, 346 U.S. 485, 491 (1953).

2. *See, e.g.*, H.R. Rep. 914, 88th Cong., 1st Sess., reproduced in 1964 Leg. Hist. *Id.* at 2108 (minority views of Reps. Poff & Cramer on H.R. 7152) ("[T]he Commission is required to bring a civil suit in the Federal District Court against the employer."); *Id.* at 3283 (remarks of Rep. Celler, 1/31/64) ("[T]he Commission could seek redress in the federal courts."); *Id.* at 3258 (remarks of Rep. Ryan, 2/1/64) ("[T]he Commission may seek relief in the Federal district court where the judge will hear the matter de novo."); *Id.* at 3279 (remarks of Rep. O'Hara, 2/8/64) ("[T]he Commission could then file suit in the district court."); *Id.* at 3117 (remarks of Sen. Carlson, 5/11/64) ("Should voluntary efforts fail the Commission could bring suit in the Federal courts.") (emphasis added). *See also* H.R. Rep. 1370, 87th Cong., 2d Sess., which formed the basis for H.R. 7152. *Compare* 1964 Leg. Hist. at 2160 ("[C]ivil action in the Federal Couts [sic]"), and *Id.* at 2175 ("[I]nitial trial should be before a U.S. District court.") *with Id.* at 2167 (description of right to bring a civil action).

Congress referred only to suits in the federal courts in discussing both the right of the Commission to bring suit and the right of an individual to do so. The unmistakable implication of these comments is that Congress understood that, under either court enforcement alternative, findings of employment discrimination would be made only by federal court judges. The same was true with regard to the Dirksen-Mansfield substitute.[3] As Senator Cotton stated, "[T]he process will lead to one place—the door of the Federal Court." *Id.* at 3308.

The decision of the court below overlooks the relevant legislative history of Title VII. Instead, the opinion cites only legislative history indicating that Title VII was never intended to be the exclusive remedy for employment discrimination. (A-8). The mere fact that the federal remedy created by Title VII was to be in addition to whatever remedies the several states might provide does not suggest that the federal remedy was not to be enforced exclusively in the federal courts. There is a vast distinc-

3. *Id.* at 3010 (remarks of Sen. Clark 4/8/64) (EEOC charged with the duty to bring "suits in the Federal courts."); *Id.* at 3286 (memorandum of Sen. Case, 4/8/64) ("Commission may seek relief in a Federal district court . . . ."); *Id.* at 3044 (remarks of Sen. Clark 6/6/64) ("[T]he party allegedly discriminated against may, with the written permission of one member of the Commission bring his own suit in Federal court."); *Id.* at 3031 (remarks of Rep. Celler, 7/2/64) ("[T]he aggrieved party . . . may file an action in the Federal district court in which the practice has occurred."); *Id.* at 3026-3027 (Comparative analysis of House and Senate versions).

tion between creating an exclusive federal remedy and creating a supplementary remedy which can only be enforced in the federal courts. *Compare California v. Arc America Corp.*, ___ U.S. ___, 57 U.S.L.W. 4425, 4427 (April 18, 1989) *with Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 379 (1985). The Seventh Circuit's conclusion that non-exclusive jurisdiction follows from a non-exclusive remedy is therefore not correct.

Even the scant legislative history cited by the court below omits language showing that Congress understood that Title VII suits would be brought in the federal courts. The Interpretive Memorandum of Senators Clark and Case, cited by the Seventh Circuit at A-8, includes the following:

> [O]rdinarily a suit will be brought in a Federal district court . . . [except that] the Commission may decide not to bring suit in a given case. . . . If the Commission decides not to sue, . . . the party allegedly discriminated against may . . . bring his own suit in Federal court. . . . The suit against the respondent, whether brought by the Commission or by the complaining party, would proceed in the usual manner for litigation in the Federal Courts.

1964 Leg. Hist. at 3044. Although the Clark-Case Interpretive Memorandum referred to H.R. 7152 prior to presentation of the Dirksen-Mansfield Substitute Amendment, it offers clear insight into Congress' understanding of both forms of court enforcement. Regardless of whether suits were brought by the Commission or by aggrieved individuals, Congress understood that actions would be handled in the same forum—the federal district courts—and that they would proceed in the unusual manner for such litigation.

2. Judicial Interpretations of the 1964 Act support a finding of exclusive federal jurisdiction.

Between the effective date of Title VII and the 1972 amendments to the Act, the question of jurisdiction to enforce the statute was decided in two cases. *Hutchings v. United States Industries, Inc.*, 428 F.2d 303 (5th Cir. 1970); and *Bowers v. Woodward & Lothrop*, 280 A.2d 772 (D.C. Ct. App. 1971). Both of these courts concluded that federal courts had exclusive jurisdiction to hear claims arising under the Civil Rights Act of 1964.

In *Hutchings*, the court stated:

> To the federal courts alone is assigned power to enforce compliance with section 703(a), and the burden of obtaining enforcement rests upon the individual claiming to be aggrieved by its violation. Pettway v. American Cast Iron Pipe Co., 5 Cir. 1969, 411 F.2d 998, 1005.

428 F.2d at 310. The court went on to observe that "Congress, however, has made the federal judiciary, not the EEOC or the private arbitrator, the final arbiter of an individual's Title VII grievance." *Id.* at 313-14.

In *Woodward & Lothrop*, the Court of Appeals held:

> Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-5(a) and (f) specifically grants jurisdiction to remedy violations of the Civil Rights Act to the Equal Employment Opportunity Commission at the administrative level, and to the United States District Courts at the judicial level. Accordingly, the court below, lacking jurisdiction on this aspect of the case, correctly ruled that appellant's allegation of Civil Rights Act violations was not before it.

280 A.2d at 774.

To Petitioner's knowledge, these are the only two cases prior to the 1972 amendments to address specifically

whether federal courts have exclusive jurisdiction over claims arising under Title VII. The holdings of these two decisions reflect the common understanding when Congress amended the statute in 1972.

3. The Equal Employment Opportunity Act of 1972 continued the policy of exclusive federal jurisdiction over Title VII claims.

Claflin, Dowd and *Gulf Offshore* impose a duty to examine the legislative history of a statute to determine if federal jurisdiction is intended to be exclusive; however, the court below noticeably avoided any detailed examination of the legislative history of the Equal Employment Opportunity Act of 1972. The 1972 amendments to the Civil Rights Act of 1964 radically restructured aspects of Title VII, including the provisions at issue in this case. A review of that legislative history demonstrates an unmistakable desire by Congress to retain all Title VII actions within the exclusive jurisdiction of the federal courts.

On June 2, 1971, the House Education and Labor Committee reported H.R. 1746, the basic purpose of which was to grant the EEOC authority to issue enforceable cease-and-desist orders and "to seek enforcement of its orders in the Federal Courts." H.R. Rep. 92-238, 92d Cong. 1st Sess., at 1 and 9, 1972 Leg. Hist. at 61 and 69. H.R. 1746 would have retained the right of an individual to bring a civil suit under the Act after the individual's claim had first been presented to the EEOC.

> Section 715 provides that if the Commission finds no reasonable cause, fails to make a finding of reasonable cause, or takes no action in respect to a charge, or has not within 180 days issued a complaint nor entered into a conciliation or settlement agreement which is acceptable to the person aggrieved, it shall notify the person aggrieved. Within 60 days after such notification the person aggrieved shall then have the right to commence an action under the provisions of the Act against the respondent in the proper United States District Court. Provision for the individual's right to sue is presently contained in Section 706(e) of Title VII. Section 715 in the bill retains this right and extends both the period of Commission action and the time period allowing for filing an action in the appropriate court.

Id. at 11-12, 1972 Leg. Hist. at 71-72. The Committee's report is instructive because it reveals that the proponents of H.R. 1746 understood that their bill was retaining the right of individuals to sue "in the proper United States District Court."

When the House debated H.R. 1746, Representative Erlenborn offered a substitute amendment authorizing the EEOC to bring suits in the federal district courts. The debate on the Erlenborn Amendment focused on whether to grant the Commission the power to file suit or the power to issue cease-and-desist orders. The language of the Erlenborn amendment provided that if the Commission had not obtained voluntary compliance with the Act within thirty days, "the Commission may bring a civil action against the respondent named in the charge . . . ." If the Commission failed to obtain voluntary compliance or institute a civil action within 180 days, "a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved . . . ." Thus, under the Erlenborn substitute, the right to bring a civil action was cast in nearly identical language without regard to whether the party was the EEOC or a private individual. It was understood to apply to all federal job discrimination cases. *Id.* at 303 (remarks of Rep. Robison).

During debate on the Erlenborn substitute, neither the proponents nor the opponents of the amendment made any

reference to enforcement actions being brought in the state courts. Rather, the numerous speakers argued in favor of enforcement in the federal district courts as a better alternative to cease-and-desist authority.[4]

In describing his amendment, Representative Erlenborn attempted to distinguish the rules and procedures which would apply in a federal district court suit from those applicable to an administrative agency with cease-and-desist power.

> I would point out, however, that the rules of evidence, the rules of civil procedure that apply in the courts, the Federal district courts, *as my bill would require any case to be tried there,* those general rules of evidence do not necessarily apply in an administrative hearing.

Id. at 219 (emphasis added). Representative Erlenborn understood that his bill would *require* any case to be tried in the federal courts. This clear and unequivocal statement is far more than an "implication from the legislative history." Similarly, other representatives understood that the Erlenborn substitute would require all enforcement actions to be brought in federal court.[5]

The debate over H.R. 1746 also focused on the proliferation of suits which could be expected by the expanded

4. *Id.* at 193 (remarks of Rep. Martin) ("[T]he matters would be handled in the Federal courts, which is the proper place to handle cases of this nature, rather than in a Commission."); *Id.* at 194 (remarks of Rep. Perkins) (referring to the existing law under Title VII: "Such enforcement as an individual might require had to be secured by private suit in the district courts."); *Id.* at 221 (remarks of Rep. Railsback) ("I would like to add my support to the Erlenborn substitute bill . . . which in effect would empower the Equal Employment Opportunity Commission to take its cases to the Federal Courts."); *Id.* at 275 (remarks of Rep. Abzug) ("[A]n administrative order can be obtained within several months, while the median time for resolving a case in the U.S. district court is 19 months.").

5. *See, e.g., Id.* at 252 (remarks of Speaker Albert) ("The opponents also seek to justify their position by arguing that the administrative

(Footnote Continued)

coverage and other changes in the Civil Rights Act made by H.R. 1746. Representative Anderson, a proponent of the cease-and-desist approach, stated his reasons for supporting that approach as "the very deep-seated fear I have that if we are going to simply overburden the Federal judiciary with congressional grants of authority in these cases, we will thereby thwart what the proponents of this change say they want, and that is efficient and expeditious enforcement of the guarantees contained under Title VII of the bill." *Id.* at 216. He cited statistics on the backlog in various federal district courts, but made no reference to the possibility that any Title VII cases would ever be heard in state courts.

None of the representatives who addressed the concern over the potential overburdening of the federal courts under the Erlenborn substitute ever suggested that the state courts, which were much more numerous, could be utilized to relieve some of this burden. *Id.* at 242 (remarks of Rep. Eckhardt) ("[I]f you load this new field of law on the courts, you are calling upon Federal judges to decide the myriad of questions that arise before them . . . . [E]ither you will not be able to get to trial before a Federal Court in one of these discrimination cases or you will so heavily load the Federal court's docket that other lawyers will not be able to try their pressing cases.").

The House adopted the Erlenborn substitute on September 16, 1971 and sent H.R. 1746, as so amended, to the

Footnote Continued—
cease-and-desist process would be inherently unjust as administered by the EEOC, and that *the protection of the principles of justice requires that these cases be heard only in the Federal courts.*") (emphasis added); *Id.* at 261 (remarks of Rep. Gerald Ford) ("In the Erlenborn substitute there is a new device for enforcement. It is a different device from the cease-and-desist, but it is an effective one, because it requires legal action in a court of law, in the Federal courts."); *Id.* at 277 (remarks of Rep. McCullouch) ("[The Erlenborn substitute] would allow only a Federal court to issue such an injunction.")

Senate for consideration. The main Senate bill was S. 2515, introduced by Senator Williams. It expanded coverage of Title VII to include educational institutions, state and local government employers and the federal government as an employer. The remedial provisions of the bill called for the EEOC to have cease-and-desist power, with its orders subject to review in the federal courts of appeals. A private right of action was retained in the proposed § 706(q) on the same terms as contained in the original House version of H.R. 1746. Federal employees were also guaranteed the right to file civil actions as provided in § 706(q), in which the head of the department, agency or unit, as appropriate, was to be the named defendant.

Senator Dominick led the opposition to the cease-and-desist enforcement scheme proposed in the Williams bill. He offered an amendment (No. 611) to substitute a civil action by the Commission or the aggrieved individual. Senator Javits protested over the effect that this amendment would have on the federal court backlog. In so doing he confirmed the common understanding that the Dominick amendment would require that all Title VII suits be filed in the federal district courts:

> The fourth point is that the backlog in the courts is extremely heavy. *In the district courts, where under the Dominick amendment suits would have to be filed,* it is the heaviest, being around a 20-month period in the major industrial states where most of these cases would be carried on.

Id. at 905 (emphasis added).

Senator Dominick stated his desire to see that the rights of both sides were fully protected. He cited both the impartial nature of the federal court system and the expertise of the federal district courts as important safeguards to protect the constitutional rights of all participants. *Id.* at 907 and 911. The Dominick amendment was initially defeated on January 26, 1972. However, it was later revised and eventually adopted by the Senate.

The next attempt to eliminate the cease-and-desist provisions of S. 2515 was an amendment offered by Senators Allen and Ervin, two opponents of the legislation. Their amendment would have substituted the bill passed by the House, H.R. 1746 (the Erlenborn substitute), for the Williams bill. Although this amendment was defeated by the Senate, statements by both Senators Allen and Ervin evidenced that they shared Representative Erlenborn's understanding that the House Bill required all Title VII cases to be tried in the federal courts.[6] No Senator ever indicated any contrary understanding.

On October 21, 1971, the Senate Committee on Labor and Public Welfare submitted a report to accompany S.

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6. *Id.* at 975 (remarks of Sen. Ervin) ("As I understand it, one of the fundamental principles of the substitute offered by the Senator from Alabama on behalf of himself and myself is to make certain that, instead of having the judicial function exercised by members of the Commission who have preferred the charges or whose associates have preferred the charges, the validity should be determined by the district courts of the United States as in all other civil actions."); *Id.* at 976 (remarks of Sen. Allen) ("So it would not be an unfriendly tribunal by which those charges or complaints would be heard. They would be heard by the Federal District Courts." "It would be a Federal district court of the place where the alleged unfair employment practice took place. . . . So the strong sentiment of just about an equal number of Senators is that the forum for settling and determining the rights of citizens shall be the Federal judiciary, starting at the courts closest home."); *Id.* at 836 (remarks of Sen. Allen) ("They [the EEOC] need to get rid of some of the backlog they have or, under the provisions of the House bill which we are seeking to substitute, have these matters decided in the Federal district court."); *Id.* at 836 (remarks of Sen. Allen) ("Let it [the EEOC] perform those two functions. Let it receive complaints, and let it prosecute the complaints, but prosecute them in a Federal court, before one of the 398 Federal district judges."); *Id.* at 989 (remarks of Sen. Ervin) ("As I construe Title VII of the Civil Rights Act of 1964, the aggrieved party . . . would have to bring the action in the district court in his own behalf to obtain a remedy for the discrimination.")

2515. S. Rep. 92-415, reprinted in 1972 Leg. Hist. at 410. This report noted that the bill would give federal workers "the full rights available in the courts as are granted to individuals in the private sector under Title VII." *Id.* at 16, 1972 Leg. Hist. at 425. No mention was made of any option to file suit in state court. Instead, the Committee expressly stated that the opportunity being given to "the aggrieved Federal employee . . . [was] to file an action in the appropriate U.S. district court . . . . It is intended that the employee have the option to go to the appropriate district court or the District Court for the District of Columbia . . . ." *Id.*

We cannot presume Congress intended to subject the personnel actions of federal department heads to review by state court judges. *See Tarble's Case,* 80 U.S. (13 Wall.) 397 (1871). By stating that these employees would enjoy the full rights available in the courts as are granted to individuals in the private sector under Title VII, the Committee evidenced its understanding that private sector claims could be brought only in federal courts.

Attaching his individual views to the Committee Report, Senator Dominick took issue with those who favored the cease-and-desist approach to resolving discrimination claims:

> This judgment is best afforded by Federal Court judges who, shielded from political influence by life tenure, are more likely to withstand political pressures and render their decisions in a climate tempered by judicial reflection and supported by historical judicial independence.

Id. at 85-86, 1972 Leg. Hist. at 493-94.

The Dominick amendment (No. 611) was again debated by the Senate in November of 1971. Again it was defeated, this time by a 41-43 vote; and again the legislative

debate left no doubt that the proposal called for exclusive jurisdiction over Title VII claims in the federal courts. In presenting his amendment to the Senate, Senator Dominick explained its purpose:

> Mr. President, what this amendment would do is to guarantee the protection of both parties' rights through fair, effective, and expeditious Federal Court machinery. It would avoid the vicissitudes of presidentially appointed boards and *vest adjudicatory power where it belongs—in impartial judges shielded from political winds by life tenure.*

1972 Leg. Hist. at 549 (emphasis added). Not all state court judges are protected by life tenure. Thus, the protection sought by the Dominick amendment excluded state tribunals by definition.

Other members of the Senate similarly articulated their understanding that the Dominick amendment would limit the adjudication of Title VII claims to the federal courts. As Senator Baker, a co-sponsor of Amendment No. 611, stated:

> [The] fundamental decision is whether enforcement powers should be vested in the EEOC itself or in the Federal courts. I for one, believe strongly that such authority should be left to the judiciary.

Id. at 559.[7]

7. *Id.* at 667 (remarks of Sen. Schweiker) ("The Senator's amendment would substitute for our EEOC hearing procedures, trials in a district court."); *Id.* at 688 (remarks of Sen. Gambrell) ("I have confidence in the Federal judicial system to implement a consistent and manageable job discrimination act."); *Id.* at 699 (remarks of Senator Fannin) ("And adjudication by the federal courts will provide the consistency and continuity which is a vital element of our judicial process."); *Id.* at 699 (remarks of Senator Allen) ("That is something we want to avoid by requiring the EEOC not to be prosecutor, judge, and jury, but to substitute Federal district courts for the judicial aspects of the Commission as provided for by the bill. The Dominick amendment would accomplish this result.")

With the narrow defeat of the Dominick amendment Senator Williams sought to temper criticism of his bill by watering down the enforcement language to provide for abbreviated proceedings in the federal district courts following a hearing held before the EEOC. *Id.* at 1355. While this amendment was pending, Senator Dominick introduced another amendment (No. 884) to provide for direct court enforcement. The new Dominick amendment contained similar language to the prior amendment (No. 611) concerning the right of the EEOC or an aggrieved individual to commence a civil action for violation of the statute.

The debate on the revised Dominick amendment again reflected a congressional understanding that the jurisdiction of the federal courts over Title VII actions would be exclusive.[8]

Following limited debate, the Senate voted to approve the Dominick amendment, and moved quickly to pass the bill and resolve its differences with the House version. Because both the Senate and House bills provided for court enforcement of claims under Title VII, the conference

8. *See Id.* at 1527 (remarks of Sen. Dominick) ("The point is however, that every governmental agency and every employee of a governmental agency, State, local or Federal, has his rights in the Federal courts."); *Id.* at 1533 (remarks of Sen. Cooper) ("I support the amendment because, fundamentally, I believe that the district courts, with the competence to hear the evidence at firsthand is much fairer than the cease-and-desist procedure . . . ."); *Id.* at 1534 (remarks of Sen. Taft) ("The real issue is whether small businessmen will have to defend charges before an agency or go to the expense of hiring big city lawyers to defend them in U.S. district courts. In my judgment the small businessmen of this country are going to find themselves in very costly, lengthy, and difficult situations if they are hauled into U.S. district court to answer every charge."); *Id.* at 1534 (remarks of Sen. Allen) ("[T]he charges would have to be filed with the various Federal district courts throughout the country where the alleged unfair employment practices took place."); *Id.* at 1534 (remarks of Sen. Dominick) ("In this particular type of situation, we would be distributing the power to enforce this law to 93 district courts with 398 district judges.").

report did not address the issue of whether federal courts would have exclusive jurisdiction over Title VII claims in any depth. The report simply noted that "Both the House bill and the Senate amendment authorized the bringing of civil actions in Federal district courts in cases involving unlawful employment practices." S. Rep. 92-681, 92d Cong. 2d Sess. at 17, 1972 Leg. Hist. at 1815. In light of the statute's mere reference to the right to bring a civil action, the Committee Report's reference is a clear indication that the conferees understood through the long debates on the court enforcement provision that Congress intended that all claims under Title VII be brought only in the federal courts.

4. Judicial and administrative interpretations of Title VII, after the statute was amended in 1972, support a finding of exclusive federal jurisdiction.

In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 479 n.20 (1982), this Court noted that it had not decided whether claims arising under Title VII were vested within the exclusive jurisdiction of the federal courts. Several of this Court's earlier decisions, however, suggest that the federal courts have exclusive jurisdiction over Title VII actions. In *Lehman v. Nakshian*, 453 U.S. 156 (1981), the Court concluded that Congress limited jurisdiction to the federal district courts for age discrimination claims brought by employees of the federal government. The Court stated that "exclusive district court jurisdiction is also consistent with the jurisdictional references in Title VII of the Civil Rights Act of 1964. *See* 42 U.S.C. §§ 2000e-5(f)(3) and 2000e-16(e)."

The reference to 42 U.S.C. § 2000e-5(f)(3) refers to the provision of Title VII granting jurisdiction to the United States district courts for actions brought under Title VII.

The provisions of 42 U.S.C. § 2000e-16(e) are applicable to federal employees, and provide that nothing contained in Title VII shall relieve any government agency or official of the responsibility to assure nondiscrimination in employment. This discussion in *Nakshian* suggests the appropriateness of finding exclusive federal jurisdiction in this case. *See also Kremer*, 456 U.S. at 468 ("The federal courts were entrusted with ultimate enforcement responsibility under Title VII."); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 64 (1980) ("Of course, the 'ultimate authority' to secure compliance with Title VII resides in the federal courts."); *Alexander v. Gardner-Denver Co.*, 415 U.S. 35, 46 (1974) ("Federal courts have been assigned plenary power to secure compliance with Title VII.").

Previously, the Courts of Appeals that have considered the jurisdictional aspects of Title VII have consistently held that jurisdiction over Title VII claims is lodged exclusively in the federal courts. *Bradshaw v. General Motors Corp.*, 805 F.2d 110, 112 (3d Cir. 1986); *Hutchings v. United States Industries, Inc.*, 428 U.S. 303 (5th Cir. 1970); *Dyer v. Greif Bros., Inc.*, 755 F.2d 1391, 1393 (9th Cir. 1985); *Valenzuela v. Kraft, Inc.*, 739 F.2d 434 (9th Cir. 1984); *Jones v. Intermountain Power Project*, 794 F.2d 546, 553 (10th Cir. 1986); *Long v. State of Florida*, 805 F.2d 1542, 1546 (11th Cir. 1986), *cert. denied*, ___ U.S. ___, 108 S.Ct. 78, 98 L.Ed.2d 41 (1988). Thus, the Seventh Circuit is the only Circuit Court to conclude that State courts have concurrent jurisdiction over Title VII claims.[9]

9. Several district courts have also ruled upon this question. *Compare* Greene v. County School Board, 524 F. Supp. 43 (E.D. Va. 1981) (holding jurisdiction concurrent); and Bennun v. Board of Governors, 413 F. Supp. 1274 (D. N.J. 1976) (same); *with* Varela v. Morton/Southwest Co., 681 F. Supp. 398, 400 (W.D. Tex. 1988) (holding that federal courts have exclusive jurisdiction over Title VII claims); Glezos v. Amalfi Ristorante Italiano, Inc., 651 F. Supp. 1271, 1277 (D. Md. 1987) (same); and Dickinson v. Chrysler Corp., 456 F. Supp. 43 (E.D. Mich. 1978) (same).

Among the state courts to consider this question, the vast majority have held that federal courts possess exclusive jurisdiction over Title VII claims.[10] When federal interests require it, Congress can require the states to offer a forum to adjudicate Title VII claims. *Testa v. Katt*, 330 U.S. 386 (1947). In the absence of a strong federal interest, respect for the principles of federalism should make this Court reluctant to construe Title VII in such a manner as to force the states to hear claims against their will.

The EEOC is also of the view that federal courts have exclusive jurisdiction over Title VII claims. *See* amicus brief for the United States and the EEOC in *Minnick v. California Dept. of Corrections*, 452 U.S. 105 (1981), and briefs filed by the Commission in *Pirella v. Village of North Aurora*, app. pending 7th Cir. No. 89-1231 and *McNasby v. Crown Cork & Seal Co.*, 3d Cir. No. 88-1893, app. pending. As the agency charged with administrative enforcement of Title VII, the Commission's views have been treated with respect and deference by this Court. *See, e.g., EEOC v. Commercial Office Products, Inc.*, 486 U.S. 100 (1988).

In sum, the vast majority of authorities that have addressed the issue have concluded that Title VII jurisdic-

10. *Compare* Bunson v. Wall, 405 Mass. 446, 541 N.E.2d 338 (1989); Fox v. Eaton Corp., 48 Ohio St. 2d 236, 237, 358 N.E.2d 536 (1976); Sweeney v. Hartz Mountain Corp., 78 Md. App. 79, 552 A.2d 912 (1989); Flournoy v. Akridge, 189 Ga. App. 351, 352, 375 S.E.2d 479 (1988); Scott v. Carter-Wallace, Inc., 137 Misc.2d 672, 52 N.Y.S.2d 614 (N.Y. Sup. Ct. 1987); Retired Public Employees' Association v. Board of Administration, 184 Cal.App.3d 378, 384-385, 229 Cal. Rptr. 69 (Cal.App. 3 Dist. 1986); Minor v. Michigan Education Association, 338 N.W.2d 913 (Mich. App. 1983); Long v. Department of Administration, 428 So.2d 688 (Fla. 1st D.C.A. 1983); Lucas v. Tanner Bros. Contracting Co., 10 FEP Cases 1104 (Ariz. Sup. Ct. 1974); and Bowers v. Woodward & Lothrop, 380 A.2d 772 (D.C. Ct. App. 1971) (all holding federal jurisdiction to be exclusive) *with* Lindas v. Cady, 150 Wis. 421, 441 N.W.2d 705 (1989); Jesson, Inc. v. Tedder, 481 So.2d 554 (Fla. 4th D.C.A. 1986); Peper v. Princeton, 77 N.J. 55, 389 A.2d 465 (1978); and Vason v. Carrano, 31 Conn. Sup. 338, 330 A.2d 98 (1974) (all holding jurisdiction to be concurrent).

tion rests exclusively in the federal courts. The conclusions of these authorities are consistent with the legislative history of Title VII and support a finding of exclusive federal jurisdiction by this Court.

C. **The purposes, structure and procedures of Title VII are clearly incompatible with concurrent state court jurisdiction over Title VII claims.**

1. **The structure of Title VII contains a delicately balanced remedial scheme which would be disrupted by permitting state courts to exercise concurrent jurisdiction over Title VII claims.**

As this Court has previously recognized, the legislative proceedings which produced Title VII were tempestuous. *Mohasco Corp. v. Silver,* 447 U.S. 807, 818 (1980). The remedial scheme resulting from the legislative maelstrom was clearly the result of compromise. As part of the compromise, Congress established an unusual structure under which individuals could not enforce their federal right to a federal forum until they had first exhausted available remedies at the state or local level for a limited period of time.

To obtain any employment practices bill, proponents of the legislation agreed to minimize federal interference with the states and to grant some measure of deference to the state efforts to eliminate racial discrimination. *See* remarks of Sen. Humphrey, 1964 Leg. Hist. at 3003. Under § 706(c) of the 1964 Act, the Commission was prohibited from taking any action on a discrimination complaint for at least 60 days in order to allow state or local officials an opportunity to remedy the alleged unlawful practice under the state or local law.

It would be anomalous to direct an aggrieved individual to a state or local agency for relief only to interrupt that process to allow the EEOC to attempt to conciliate the

claim before again authorizing the individual to return to a state forum. If Title VII claims could be asserted in state courts, there would be no reason to require aggrieved individuals to delay pursuit of their claims at the state level merely to allow the EEOC to attempt to conciliate the dispute.

The Seventh Circuit failed to see any incompatibility between the federal interests and State-court jurisdiction because the court viewed the Title VII deferral process as comparable to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 626. Here the court was mistaken. Although the substantive rights under the ADEA were patterned on Title VII, the remedial provisions of the ADEA were based on the Fair Labor Standards Act, which expressly provides for concurrent jurisdiction. 29 U.S.C. § 626(c). While the ADEA requires that an aggrieved individual pursue a claim before an available state or local agency, this may be done concurrently with the prosecution of a federal claim. *Oscar Mayer & Co. v. Evans,* 441 U.S. 750 (1979).

In contrast, § 706 of Title VII provides a carefully ordered sequential procedure. *Mohasco Corp. v. Silver,* 447 U.S. at 821. The court below erroneously confused the remedial and procedural provisions of Title VII with those of the ADEA. As this Court noted in *Lorillard v. Pons,* 434 U.S. 515, 584 (1978), "[I]t is the remedial and procedural provisions of the two laws that are crucial, and there we find significant differences." The court below improperly blurred those distinctions.

The remedial scheme of Title VII also includes provisions for appeals. Section 706(j), 42 U.S.C. § 2000e-(5)(j), provides:

> Any civil action brought under this section and any proceedings brought under subsection (i) shall be sub-

ject to appeal as provided in sections 1291 and 1292, Title 28.

Sections 1291 and 1292 of Title 28 of the United States Code govern the appellate jurisdiction of the United States Courts of Appeals. The court below held that this provision was a mere grant of jurisdiction. (A-7). Such a reading of the statute is too narrow. First, it was not necessary for Congress to state expressly that appeals could be brought to the Court of Appeals. Second, §§ 1291 and 1292 carry interpretations as to what constitutes an appealable order, a concept that may differ from state to state. Third, the inclusion of specific language concerning appeals demonstrates that Title VII is incompatible with concurrent state court jurisdiction. Neither Section 1291 nor 1292 authorize the Courts of Appeals to review cases from State courts. As the Ninth Circuit held in *Valenzuela v. Kraft, Inc.*, 739 F.2d 434 (9th Cir. 1984):

> Congress could not have intended that actions brought in state court be appealed to the federal circuit courts. Thus section 706(j) unmistakably implies that Congress intended to vest exclusive jurisdiction in the federal courts.

Id. at 435.

2. The federal interest in promoting a uniform interpretation of Title VII supports a finding of exclusive federal jurisdiction over Title VII claims.

One of the factors generally recommending exclusive federal-court jurisdiction over an area of federal law is the desirability of uniform interpretation. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. at 483-84. A great diversity in the interpretation of a statute is likely to result when it is subject to interpretation by a large number of courts.

When state courts share adjudicatory power over a federal enactment, their incorrect interpretations are less likely to be corrected by this Court.

Congress was cognizant of the need for uniform interpretations of Title VII. Proponents of the cease-and-desist approach cited the need for uniformity of interpretation as reason for granting the EEOC cease-and-desist authority. *See e.g.*, 1972 Leg. Hist. at 196. Opponents of cease-and-desist authority did not challenge the need for uniformity. Rather, their concerns were that the determination be made by the federal district courts instead of an administrative body.

The court below found that the existence of a great body of Title VII law reduced the risk to uniformity that concurrent jurisdiction would engender. (A-9). The lower court's approach overlooks the fact that Title VII is constantly evolving. Its contours and definitions are subject to change and refinement as this Court and the federal courts of appeals render new decisions.

In addition, the uniformity of interpretation that is accomplished by exclusive federal jurisdiction will also promote the independence of state court development of state anti-discrimination laws. If state courts are found to have concurrent jurisdiction over Title VII claims, there is a substantial chance that the substantive federal law will subsume and overwhelm independent state law. In a situation of flourishing state experimentation in the development of anti-discrimination initiatives, it seems that the diversities and conflicts which are a beneficial aspect of our federal system are best promoted by leaving state courts free to focus on their own anti-discrimination laws.

3. The expertise and unique stature of federal judges in interpreting Title VII recommends a finding of exclusive federal jurisdiction over Title VII claims.

In *Gulf Offshore* this Court recognized that the expertise of federal judges in interpreting federal law is a significant factor recommending exclusive federal jurisdiction. 453 U.S. at 484. There can be no doubt that federal judges have developed an impressive expertise in applying Title VII law. The court below discounts that expertise because most states have enacted employment discrimination laws. That analysis is faulty because it is premised on the assumptions that employment discrimination claims are routinely litigated in state courts and that state court judges are quite familiar with discrimination issues. Those assumptions were incorrect when Title VII was adopted and remain incorrect today.

At the time Title VII was adopted, only about one-half of the states had any anti-discrimination laws. Experience indicated that very few cases brought under those state laws were ever litigated in a judicial forum. 1964 Leg. Hist. at 2155, 2160. Thus, at the relevant time, there was no reason to believe that state courts would be competent to handle Title VII claims.

Even today, the state courts are no more competent to handle Title VII claims than they were in 1964. The vast majority of states that have anti-discrimination laws have delegated enforcement to administrative agencies whose findings are subject to only limited appellate review.[11]

11. At the time of the 1972 amendments, 38 states had equal employment opportunity laws, of which 32 utilized the cease-and-desist method of enforcement. 1972 Leg. Hist. 202-03 (remarks of Rep. Hawkins). Since then several additional states have opted for a cease-and-desist enforcement mechanism. *See* Fla. Stat. § 760.10 (1983); Ga. Code Ann. § 45-19-38 (1981); La. Rev. Stat. Ann. § 2261 (West 1988); Mo. Rev. Stat. § 213.075.1 (1986); Mont. Code Ann. § 48-119 (1989); Nev. Rev. Stat. § 233.170 (1983); N.H. Rev. Stat. Ann. § 354-A:9 (1986); S.D. Codified Laws § 20-13-42 (1989); and Tenn. Code Ann. § 4-21-305 (1989).

Illinois courts, for example, never try race or sex discrimination cases, but merely review administrative agency findings under the "manifest weight of the evidence" standard. Ill. Rev. Stat., Ch. 68, § 8-11(A)(2). It would not further the purpose of Title VII to entrust its development to courts that are incompetent under state law to hear the kinds of cases that will arise under the federal statute.

Title VII litigation is both complex and subtle. *See* 1972 Leg. Hist. at 672 (remarks of Sen. Humphrey). Forcing state courts to handle Title VII claims when they do not hear similar claims under state law, or when the cases they do hear are governed by decisional rules materially different from those governing Title VII, is to thrust them unprepared into a complicated body of federal law with which the federal judiciary has already developed a substantial expertise. The result necessarily will be to create problems and expand the litigation of this already complex area.

One characteristic of federal judges which Congress considered important in 1972 is the fact that they are appointed for life and are thus insulated from various forms of political pressure. 1972 Leg. Hist. at 493 (individual views of Sen. Dominick). Congress considered it an important protection for the rights of defendants to have Title VII cases tried before judges with life tenure. *Id.* 549 (remarks of Sen. Dominick). This protection cannot be guaranteed if Title VII jurisdiction is found to be concurrent. Not all state judges are vested with life tenure, and defendant employers may not always be able to remove Title VII cases to federal courts.

4. **The greater hospitality of federal courts to the requirements of Title VII supports a finding of exclusive federal jurisdiction over Title VII claims.**

Another factor cited in *Gulf Offshore* as generally recommending exclusive federal-court jurisdiction over an area of federal law is the assumed greater hospitality of federal courts to peculiarly federal claims. 453 U.S. at 483-84. The court below read this factor as somehow requiring a showing that state courts would be hostile to Title VII actions. (A-10).

The Court of Appeals found no reason to believe that state courts might today be hostile to Title VII actions, but such a statement would not have been accurate in 1964. Title VII was adopted in part because many states were openly hostile to the rights of blacks and other minority groups. *See* 1964 Leg. Hist. at 3012, 3066 (remarks of Senator Clark). While state courts may "theoretically" be amenable to Title VII suits, they were not all amenable in practice when the Act was adopted.

Title VII contains several procedural devices that Congress considered important adjuncts to ensure that rights under Title VII could be effectively enforced. Section 706(f)(4) requires the chief judge of the district or the circuit "immediately to designate a judge in such district to hear and determine the case." The designated judge is required by § 706(f)(5) "to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited." If the case is not scheduled for trial within 120 days after issue has been joined, the judge may appoint a master "pursuant to Rule 53 of the Federal Rules of Civil Procedure." The Seventh Circuit did not consider these provisions of the statute. Nor did it consider the provisions of § 706(f)(2) which allow the court to

appoint counsel for the complainant and waive the payment of fees, costs and security. However much a state court may embrace the policies of equal employment opportunity, it is not likely to welcome the use of procedural devices under Title VII which have no analog in the state system.

Sections 706(f)(2) and (5) both require that certain aspects of a Title VII action be handled in accordance with specified Federal Rules of Civil Procedure. By making these rules applicable to Title VII actions, Congress made it unmistakably clear that it expected those actions to be tried only in the federal courts where the rules apply.

Any alternative construction of the statute poses immediate problems. First, the courts could hold that the designated provisions of Title VII are not applicable when the cases are brought in state court. Yet some of those provisions, such as Rule 65, are designed to protect the rights of defendants who may have no opportunity to select a federal forum. The use of different procedures in Title VII actions, depending on whether they are brought in state or federal court, threatens to introduce another element of uncertainty into Title VII adjudication. In *Garner*, 356 U.S. at 491, this Court recognized that "a diversity of procedures are quite as apt to produce incompatibility or conflicting adjudications as are different rules of substantive law."

In contrast, the courts could also hold that these procedural provisions of Title VII apply in the state courts. Such a holding would force states to deviate from their normal administrative procedures solely to accommodate Title VII claims. There is no basis in the legislative history of Title VII to suggest that Congress attempted "to regulate the procedures and priorities of the state courts." *Valenzuela*, 739 F.2d at 436. State courts can be expected to resent the interference that Title VII would produce.

CONCLUSION

Because Donnelly attempted to initiate her Title VII suit in state court, and state courts lack jurisdiction over Title VII claims, the decision below should be reversed and the case remanded with instructions to dismiss the complaint.

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